IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 288 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

FAIZUHUSAIN MAHMADALI

Versus

MEMAN ABDULKUDDAS H ISMAILBHAI

Appearance:

MR MS SHAH for MS SURESH M SHAH for Petitioner

MR AJ PATEL for Respondent No. 1

MR JAYESH M PATEL for Respondent No. 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 25/09/2000

C.A.V. JUDGEMENT

1. This Revision under Section 29(2) of the Bombay Rent Act (for short "the Act") has been filled by the alleged sub-tenant - defendant No.2 against the Judgment

and Decree of the Lower Appellate Court dismissing the Appeal of the revisionist and confirming the decree for eviction passed by the trial Court.

2. Brief facts giving rise to this revision are as under :

The property in dispute is a shop which was owned by the plaintiff's predecessor in title. The plaintiff landlord purchased the said property on 10.6.1976 from the previous owner. The defendant No.1 was tenant in the said shop from the time of the predecessor in title of the plaintiff on monthly rent of Rs.30/-. After the plaintiff purchased the said shop the defendant No.1 became his tenant. It was alleged that the defendant No.1 did not pay rent since 9.6.1977 to 9.12.1977 amounting to Rs.360/-. In this way the tenant defendant No.1 failed to pay rent exceeding six months to the plaintiff. Notice was served on the defendant No.1 on 29.12.1977, but he neither replied the notice nor paid arrears hence Suit for eviction was filed firstly on the ground of tenant defendant No.1 being in arrears of rent exceeding six months which he failed to pay within a month of service of notice of demand. The second ground for eviction was that the defendant No.1 had illegally sub-let the disputed shop to the defendant No.2, viz. the revisionist without the consent of the plaintiff or his predecessor in title. The third ground was that after alleged sub-letting the defendant No.1 did not use the suit property for the purpose for which it was let out for a period exceeding six months before institution of the Suit. On these three grounds eviction of the defendant was sought.

3. The tenant in chief - defendant No.1 resisted the Suit on the ground that no doubt he did not pay rent as alleged by the plaintiff, but the rent accumulated because the plaintiff did not accept the rent and stopped issuing receipt. The allegation of sub-letting by him to the defendant No.2 was denied. It was alleged that the defendant No.2 had obtained his signature on a paper stating that it was required for income-tax purpose, but by cheating him the defendant No.2 created an Agreement for sale for transfer of running business by the defendant No.1 to the defendant No.2.

4. The defendant No.2 resisted the Suit on the ground that it was a collusive suit which was filed by the plaintiff in collusion with defendant No.1 and that he is not sub-tenant of the defendant No.1. On the other hand he pleaded that he obtained possession of the Suit shop from the defendant No.1 under a Sale transaction in

which he purchased the tenancy rights as well as business, good-will and stock in trade as going concern. He also alleged that he remitted rent to the plaintiff but it was not accepted. He further pleaded that no notice was given to him hence the Suit is liable to be dismissed.

5. The trial Court found that the defendant No.1 was tenant in arrears of rent for a period exceeding six months which he did not pay despite service of notice of demand. It was also found by the trial Court that the defendant No.1 had illegally sub-let the suit premises to the defendant No.2. With these findings the suit for eviction of the two defendants was decreed along with arrearss of rent.

6. Both the defendants filed seperate Appeals against the Judgment and Decree of the trial Court. The two Appeals were disposed of by the lower Appellate Court through common Judgment. Both the Appeals were dismissed by the lower Appellate Court hence this revision by the alleged sub-tenant.

7. It may be mentioned that the tenant in chief - defendant No.1 has not preferred any revision against the Judgment of the lower Appellate Court dismissing his Appeal. Consequently the order of dismissal of Appeal of the defendant No.1 has become final.

8. I have heard Shri M.S.Shah, learned Counsel for the revisionist and Shri A.J.Patel, learned Counsel for the landlord - respondent Nos.1 to 3. None appeared for respondent No.4 who was defendant No.1, viz. tenant in chief in the Suit.

9. Since no revision has been filed by the defendant No.1 - tenant in chief there is no reason to disturb the concurrent findings recorded by the two courts below that this defendant failed to pay arrears of rent exceeding six months within a period of one month of service of notice of demand. Cogent reasons have been given by the two courts below for recording these findings.

10. The plaintiff became owner of the suit shop under a Registered Sale Deed dated 11.6.1976 from the previous owner. There is also evidence that subsequently the shop was demolished and reconstructed whereafter its possession was given to the defendant No.1 and the rent was enhanced from Rs.30/- to Rs.60/- per month. The defendant No.1 admitted that he was in arrears of rent for more than six months. He did not raise any dispute

of standard rent. His stand was that he was paying rent at the rate of Rs.60/- p.m. to the plaintiff, but after 9.6.1977 he stopped paying rent to the plaintiff because the plaintiff stopped issuing receipt. This stand was rightly rejected by the two Courts below on the ground that normally there was no reason for the plaintiff not to accept the rent or to issue receipt and if the rent was not accepted it could be paid through other mode, namely, by remitting the same through Money Order. That course was not adopted by the defendant No.1 nor he deposited the rent in Court. Consequently case of the landlord was fully covered under Sec. 12(3)(a) of the Act and this defendant was liable to be evicted from the suit accommodation.

11. The next point for consideration is whether the defendant No.1 had illegally sub-let the suit shop to the defendant No.2. On behalf of the defendant No.2, namely, the revisionist Shri M.S.Shah, learned Counsel representing him streneously argued that this is not a case of sub-letting and in any event the alleged sub-letting is protected under Sections 14 & 15 of the Bombay Rent Act. It was also argued by him that the defendant No.2 purchased the running business from the defendant No.1 through Deed Ex.61 hence also alleged sub-letting is protected in view of notification issued by the State Government under Proviso to Section 15(1) of the Rent Act. As against this learned Counsel for the landlord - respondents No.1 to 3 argued that it was a case of illegal sub-letting and that the deed Ex.61 obtained by the defendant No.2 revisionist from the defendant No.1 - respondent No.4 is a colourable document which cannot save illegal sub-letting.

12. So far as the first contention of Shri Shah is concerned that the illegal sub-letting is protected under Section 14 of the Act is concerned I do not find much force in his contention. Section 14 of the Act provides that where the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the promises or any part thereof have been lawfully sub-let (before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959) shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued. Obviously it is not proved from the evidence on record that the alleged sub-letting took place prior to enforcement of Bombay Rent Ordinance, 1959 hence Section 14 is hardly attracted on the facts of the case.

13. Now comes the question of consideration of Section 15(1) and Notification issued by the State Government under proviso to this sub-section.

Section 15(1) provides that "notwithstanding anything contained in any law, (but subject to any contract to the contrary), it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein." There is thus bar on sub-letting after enforcement of Bombay Rent Act and the tenant in chief can not sub-let either whole or part of the premises let out to him nor he can assign or transfer in any other manner his interest therein. However, proviso to sub-section 1 of Section 15 saves certain types of sub-letting. It provides that the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases and to such extent as may be specified in the notification.

14. It, therefore, follows that if there is notification of the State Government which permits transfer by way of sub-lease or sub-letting in any area such sub-letting is protected. This takes us to consideration of notification issued by the State Government. Notification No.5975/33/Health & Local Government Department, dated 21.9.1948, permitted in all areas in which part (II) of the Act operates all transfers and assignments by lessees of their interest in the lease-hold premises to the extent specified in the Schedule annexed to the said notification. Clause (2) of the Schedule to the said notification permits transfer or assignment incidental to sale of a business as going concern together with stock-in-trade and the good-will thereof provided that the transfer or assignment is of the entire interest of the transferor or assigner in such lease hold premises together with the business and the stock in trade and the good-will thereof.

15. The so called assignment in favour of the revisionist is evidenced through Deed Ex.61 executed by defendant No.1. The case of the defendant No.1 was that his signatures were only obtained on the representation by the defendant No.2, that such signature was being obtained for Income-tax purpose and that he was cheated by the defendant No.2 who had prepared it as an assignment of running business. The two Courts below by giving cogent reasons found that it was a colourable

document and not a genuine document. The reasons given by the trial Court on this point are more convincing. It appears from the material on record that the defendant No.1 had no saleable interest either in the business or in the tenancy rights. His case was that he took the defendant No.2 as partner, but this theory was not believed by the two Courts below. Even if it is believed that the defendant No.2 was taken as partner by the defendant No.1 then the defendant No.1 could sell his share in partnership to the defendant No.2 and not the whole share or interest in the business, stock in trade, as well as tenancy right. The Deed Ex.61 shows that everything was sold to the defendant No.2.

16. Clause (2) of the Schedule to the said notification permits transfer or assignment incidental to the sale of a business as a going concern together with the stock in trade and the good-will thereof, provided that the transfer or assignment is of the entire interest of the transferor or assigner in such lease hold premises together with the business and the stock in trade and good-will thereof. Under clause (2) of the Schedule what is to be assigned is not a mere business in the abstract sense, but a business as a going concern with the stock-in-trade and the goodwill thereof. If a business is to be characterised as a going concern that business must be run at the time of the assignment. It must be going business where transactions take place from time to time though not with clockwise regularity. For a business to go on, there must be stock-in-trade in the premises where that business is carried on. One test of determining as to whether the business is a going concern is to find out whether the assignee after the assignment would be in a position to carry on the business which was being carried on in the suit premises by the assignor. The question whether a business was going concern or not is not a question of fact which has to be determined in the light of aforesaid tests.

17. If the aforesaid tests are applied to the facts of the case before me it can be said that the so called business which was assigned through Ex.61 was not a running business having stock-in-trade or good-will. It has come in evidence that the defendant No.1 was doing the business of Stove repairing and of making tin boxes and selling the same in the suit premises. The business carried on by the defendant No.2 in the suit shop is all together different and it was styled as "Liberty Framing Works "where Photo framing is being done in the suit shop. Thus, the entire business has been changed. It was not a running business of stove repairing or making

tin boxes which was assigned through Ex.61. The trial Court has given cogent reasons that the alleged consideration for assignment is also fictitous. It was rightly observed that there can be no stock in trade for running a business of stove repairing or for making tin boxes. There could be similarly no furniture nor stock-in-trade was required for running such business. The consideration for stock-in-trade at Rs.2000/- and value of good-will at Rs.1000/- mentioned in Ex.61 was therefore wholly imaginary and was rightly disbelieved by the trial Court. The value of stock-in-trade at Rs.4000/- was also rightly disbelieved by the trial Court.

18. Ex.61 was no doubt written on a stamp paper and it was got registered, but there is no presumption either of fact or of law that a registered document is always genuine. Whether the document is genuine or not is to be decided on the evidence on record keeping in view the intention of the parties. The defendant No.1 who is said to be executant of this document had stated and pleaded that he was cheated by defendant No.2 who obtained his signature on a paper disclosing that it was obtained for Income-tax purpose. The theory of collusion set up by the revisionist between the plaintiff and the defendant No.1 is not proved. Shri Shah contended that since the defendant No.1 has not filed any revision consequent upon failure in his Appeal it is a circumstance which establishes collusion between the plaintiff and the defendant No.1, but I am unable to accept this contention. If a party failed in Appeal and did not file Revision necessary inference of collusion between the tenant in chief and the landlord cannot be drawn. After all the decree for eviction was passed against the tenant in chief and he is liable to be evicted. Why should he then collude with the plaintiff in these circumstances.

19. It may also be mentioned that Ex.61 was prepared on a stamp paper. The stamp paper of Ex.61 shows that it was purchased on 30.12.1972 whereas the Deed of assignment was prepared and got registered on 1.5.1976. It is difficult to believe that for these five years the blank stamp paper should have been preserved only for preparing a Deed of Assignment. Moreover the Deed was written in English at the instance of Advocate, but it was signed by the two defendants in Gujarati. There is no mention that the contents of the Deed were explained by the Advocate to the defendants in Gujarati. Simply because it was prepared at the instance of an Advocate it cannot be believed that the contents were explained by him to the parties especially when the defendant No.1 has

made allegation of being cheated by the defendant No.2.

20. The revisionist admitted that in the year 1976 the defendant No.1 had no business. He further admitted that Ex.61 was executed at the instance of the Advocate and that when it was executed the defendant No.1 had no business. This admission of the revisionist in the trial Court clearly indicates that at the time of assignment through Ex.61 the defendant No.1 had no business. Consequently no running business including stock-in-trade and good-will could be assigned by him to the revisionist. If this is so then the two courts below were justified in concluding that the Deed Ex.61 was a colourable document. If Ex.61 is found to be colourable document then the revisionist is hardly entitled to protection of notification issued by the State Government u/s. 15(1) of the Rent Act.

21. It is in evidence that since 1972 to 1976 vide Ex.61 to Ex.63 the business in the shop was run in the name and style of " Liberty Framing Works". The Deed of assignment was executed in May, 1976. Originally business of Stove repairing and making tin boxes was carried on in the suit shop. This business was non-existent since 1972. Consequently no running business of stove repairing and making tin boxes could be or was assigned through Ex.61 in 1976.

22. Thus, if Ex.61 is found to be colourable document with a view to seek protection under notification issued in view of proviso to Section 15(1) of the Bombay Rent Act the revisionist is hardly entitled to its protection. If this protection is lost then the natural inference would be that the revisionist was sub-tenant.

23. It is also in evidence that after the plaintiff purchased the shop he demolished it and reconstructed it. Originally the rent was Rs.30/- p.m. and after reconstruction the rent was enhanced to Rs.60/- p.m. Consequently the plaintiff could be believed that he never admitted the defendeant No.2 has his tenant. The theory of the defendant No.2 revisionist that he became tenant of the landlord is thus liable to be rejected out-right.

24. In order to establish sub-letting the onus is upon the landlord to establish firstly that the tenant in chief has parted with exclusive possession to the alleged sub-tenant and that such transfer was for consideration. It is generally difficult for the landlord to establish illegal sub-letting by direct evidence. At the most the

landlord can establish that the tenant has parted with possession of the suit premises in favour of the sub-tenant and that he is not in possession of the same. Exclusive possession in this case appears to have been transferred inasmuch as there was total change of business from stove repairing and making tin boxes to Photo Framing Business. It is also in evidence that the defendant No.1 is not in possession either exclusive or partial of the suit shop. It is also not established that the defendant No.1 is participating in the new business or is receiving share or profit from the new business. If the defendant No.1 has transferred exclusive possession to the defendant No.2 it can be inferred that this transfer was for consideration and even if consideration is not proved it can be said to be transfer or assignment in any other manner of the tenancy rights of the defendant No.1 to the defendant No.2. That also constitutes ground for eviction of the defendant No.1 as well as of the defendant No.2.

25. It may also be mentioned that if the tenant in chief is liable to be evicted then any person occupying the shop or the tenanted premises along with the tenant is liable to be evicted. If the defendant No.2 is considered to be a partner of the defendant No.1 then also he is liable to be evicted because the tenancy was created in the name of the defendant No.1 and not in the name of partnership firm nor for running partnership business. Further, the defendant No.2 has lost protection of notification u/s.15(1) of the Act. For these reasons he is also liable to be evicted.

26. Shri M.S.Shah, learned Counsel for the revisionist has relied upon two decisions of the Hon'ble Supreme Court. In RESHAM SINGH V/S. RAGHBIR SINGH, REPORTED IN AIR 1999 SC 3087 the facts were all together different. Here the tenant allowed his brother to look after shop premises. There was no evidence to show that the possession of the premises was parted by the tenant exclusively in favour of his brother. Likewise no relationship of lessor and lessee between the tenant and his brother was established. On these facts the Apex Court held that no case of sub-letting was made out. No doubt in this case the Apex Court laid down that the question of sub-letting is a question of law still it laid down that the High Court can satisfy itself whether the said question was properly decided by the Rent Controller and the Appellate Authority or not. If sub-letting is considered to be a question of law then I have examined that question with reference to the evidence on record and found that the plea of illegal

sub-letting is established and in any case the plea of assignment or transfer of tenants right in any other manner in the suit shop is also established. Consequently the decree for eviction cannot be disturbed.

27. The other case relied upon by Shri M.S.Shah was the Apex Court's verdict in Ms. LABANYA NEOGI V/S. M/S. W.B.ENGINEERING CO., REPORTED IN AIR 1999 SC 3331. Here also the facts were all together different. The tenancy was between the landlord and a firm for residential purposes. Right from the inception of tenancy the premises was occupied by the employee of the firm. Such employee was also relative of a partner of the firm. The said employee subsequently became proprietor of the firm. On these facts the Apex Court held that it cannot be said that there was abandonment or transfer of tenancy by the firm. The facts of the case before me are, however, all-together different. Merely because the revisionist was in occupation of the premises along with the tenant in chief since long it cannot be said that he acquired any independent right to remain in occupation of the disputed premises. His position is no more better than the illegal sub-tenant in the instant case. The findings which have been recorded by the two courts below, after considering the entire evidence on record, are not liable to be interfered in this revision and for this the case of Ms. Labanya Neogi (Supra) can be cited.

28. In M/s. SHAH & CO. V/S. STATE OF MAHARASHTRA, reported in AIR 1967 SC 1877 the Hon'ble Supreme Court has held on the question of assignment of tenancy rights under clause (2) of notification issued by the State Government u/s.15(1) of the Bombay Rent Act that where the assignment was a colourable device for obtaining tenancy right prohibited u/s. 15(1) of the Act the tenant or a sub-tenant does not acquire any right under the notification. This case also supports the landlord respondents that the concurrent judgments and decrees of the two courts below are perfectly legal.

29. No other point was pressed.

30. In the result I do not find any merit in this revision which is hereby dismissed with no order as to costs.

sd/-

Date : September 25, 2000 (D. C. Srivastava, J.)

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